Supreme Court, U.S.
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No. 96-1996

In The

Supreme Court of the United States

October Term, 1996

S. MARTIN GORDON; ERIC OLE THORSEN and JOEL J. FLICK,

Petitioners,

vs.

THE COUNTY OF ROCKLAND,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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Respondent, Rockland County, respectfully requests that this Court deny the petition for a writ of certiorari which seeks review of the Second Circuit's opinion below. That opinion is reported at 110 F.3d 886 (2d Cir. 1997) and is reprinted in the petition for certiorari at Appendix A.

STATEMENT OF THE CASE

Petitioners have grossly distorted the facts relevant to the powers, responsibilities and status of assistant county attorneys in Rockland County. As detailed below, the evidence plainly demonstrates that petitioners held confidential, policymaking positions and that party affiliation was an appropriate requirement for effective performance of their jobs. Therefore, there is no cause for this Court's review of the conclusion below that petitioners were not entitled to First Amendment protection from dismissal.

In Rockland County, assistant county attorneys are exempt from civil service protection (A246-48) and are designated by the Rockland County Legislature as "policymakers" for the purposes of financial disclosure. (A227). Assistant county attorneys serve at the pleasure of the county attorney and can have their appointments revoked by him at any time. (A239).

Under New York law, the county attorney appoints his assistants and, if more than one assistant is appointed, the county attorney must designate in writing a succession list detailing which assistants shall assume the powers and duties of the county attorney in the event of a vacancy. (A239). In 1993 and until March 1994, petitioners Eric Ole Thorsen and S. Martin Gordon were listed first and second on this list of succession (after the deputy county attorney) and petitioner Joel J. Flick was fifteenth. (A45-46).

The county attorney is Rockland County's "chief legal advisor." His powers and duties — which Messrs. Thorsen and Gordon were at the top of the list to exercise — include:

> The County Attorney may, upon the request of the governing body of any town, village, school district or special district and with the approval of the County Legislature, act as the legal advisor for such body. . . . The County Attorney shall also perform such other related legal functions as the County Legislature or the County Executive may designate in order to implement and accomplish the policies and responsibilities the County Legislature has prescribed.
>
> The County Attorney shall advise and represent all county officers and employees in relation to their official duties and, where in the interest of the county, prepare all necessary papers and written instruments in connection therewith; prosecute or defend all actions or proceedings of a civil nature brought by or against the county; when authorized by the County Legislature or the County Executive, prosecute and defend all proceedings of a civil nature brought against the County Legislature or any county officer or employee whose compensation is paid from county funds for any official act. . . . on request, prepare resolutions, ordinances, legalizing acts and local laws to be presented for action by the County Legislature, together with notices and other items in connection therewith; and perform such other and related

> duties as may be prescribed by law not inconsistent with the Charter or this code or by ordinance or resolution of the County Legislature.

(A240).

As assistant county attorneys, petitioners' official duties and responsibilities — as defined by Rockland County's Civil Service Rules — were as follows:

> DISTINGUISHING FEATURES OF THE CLASS:
>
> This is professional legal work of a complex legal nature involving the responsibility for representing the County in court cases and in the performance of other legal work. General supervision is received from the County Attorney. Does related work as required.
>
> TYPICAL WORK ACTIVITIES:
>
> Researches the law and renders opinions to the County Legislature and department heads as directed by the County Attorney;
>
> Prepares pleadings, appeals, resolutions, notices, contracts and other legal papers and documents;
>
> Examines legal papers served on or filed with County departments; Appears in Court or at hearings to represent the County.

FULL PERFORMANCE KNOWLEDGES, SKILLS, ABILITIES AND PERSONAL CHARACTERISTICS:

Good knowledge of the principles and practices of law, particularly as concerned with the organization and operation of County departments and agencies; ability to express arguments of the law by written and spoken words; ability to deal effectively with people; physical condition commensurate with the demands of the position.

MINIMUM QUALIFICATIONS:

Possession of a license to practice law in the State of New York.

(A222).

While their management styles differed, both the current County Attorney Paul Nowicki, a Republican, and his predecessor, Ilan Schoenberger, a Democrat, testified that they needed loyal and trusted assistant county attorneys to function effectively. For example, Mr. Schoenberger described assistant county attorneys as his "associates" who would do work under his name. (A157). He added that he wanted them to act "as lawyers" and treat the County as they would a private client. (*Id.*). Mr. Schoenberger acknowledged that he did not closely supervise the work of his assistants because he "trusted" them. (A158). He further testified that because assistant county attorneys had to interpret and follow his policies — at times without coming to him for authorization before speaking — he would not want to employ an assistant county attorney who he could not trust. (A161-63).

Like Mr. Schoenberger, Mr. Nowicki testified that he relies on his assistant county attorneys to use their expertise and skill in performing their responsibilities. (A191-92). Mr. Nowicki explained that he terminated Messrs. Gordon and Thorsen — as well as other assistant county attorneys who did not sue the County — because he wanted to produce an office that could work better with the new administration. (A180). Unlike Mr. Schoenberger, who testified he ran a very tight ship, Mr. Nowicki testified that he routinely delegates responsibilities to his assistants because they are "professionals" who do "whatever has to be done" to solve a problem or resolve a legal question. (A190-94).

Mr. Nowicki's testimony about how he runs his department was consistent with testimony of Rockland's County Executive, C. Scott Vanderhoef, concerning his administration's organizational strategy and how it differs from the philosophy of the prior administration. In this regard, Mr. Vanderhoef explained that the prior administration's strict hierarchical approach "did not allow managers to manage." His administration, however, employs total quality management which allows managers to take fuller responsibility for their departments and their actions. This strategy involves employees in most decision-making efforts, which results in "a decentralization of decision-making." (A181-82). With respect to the duties and responsibilities of assistant county attorneys, Mr. Vanderhoef testified that he expected them to do a thorough, competent and professional job. He also testified that assistant county attorneys advise him directly on health issues, personnel issues and tax questions. (A183).

In addition to petitioners, another assistant county attorney testified on their behalf. He testified that he is principally responsible for all matters within Rockland County that deal with personnel or labor issues and explained that this work

includes drawing up disciplinary charges and prosecuting the charges at disciplinary proceedings, arbitrations and other judicial proceedings. (A208-09; 212-14). He also gives legal advise to the board of trustees of Rockland Community College and meets with the Sheriff of Rockland County — an elected official — on a weekly basis. (A215-16). This assistant testified that his job duties: (a) were assigned to him at the discretion of the county attorney; and (b) could be assigned to a part-time assistant county attorney if the county attorney so desired. (A210-11).

1. *Mr. Gordon*

Mr. Gordon was an assistant county attorney from January 1978 until his termination in March 1994. Before working in the County Attorney's Office, he was a registered independent, but he changed his party affiliation to Democrat because "most of the people around him were registered Democrats." (A138). Before his termination, Mr. Gordon described his job duties and experiences as follows:

> My specialty is real property law. I handle commercial civil litigation and municipal law with emphasis on County law as it pertains to Article 5A. I have been handling the Rockland County Sewer District No. 1 affairs since January 1978. I have handled numerous Eminent Domain Procedure takings on behalf of the sewer district and I have handled negotiations on real property purchases and matters for the County Executive department.
>
> I regularly attend the sewer commission meetings held at least once monthly and in addition I attend those legislative committee

> meetings and meetings of the legislature when sewer commission matters are on the agenda. I am in the County attorney's office at least three times each week and I am in constant communication with the executive director of the sewer district, Ronald Delo, on an almost daily basis by phone or at the sewer district offices in Orangetown. In this respect I handle contractor problem issues, real property tax matters, negotiations with contractors on claims, negotiations with engineers, represent the sewer district with regards to NYS DEC litigations, advise on enforcement of industrial sewer code violations.
>
> I have some experience in electric utility matters, having handled the origination of the County's electric utility agency. I have been the liaison with Orange & Rockland as regards rates and low cost power through the New York Power Authority. I have also handled county contracts with regards to purchase of low cost gas purchase in bulk, through the public bidding process. I have testified on behalf of the county in several rate cases before the Public Service Commission.

(A220).

Amplifying on this personal job description, Mr. Gordon testified that he was expected to assist the County Sewer Commission in implementing the "wishes" or "directives" of the County Legislature. (A130). He also stated that he had the

authority, as counsel for the Sewer Commission, to initiate litigation without having to go to Mr. Schoenberger for permission. (A132). Moreover, Mr. Gordon acknowledged that he assisted the former county executive with respect to the condemnation and purchase of real estate. (A132-33). In these instances, Mr. Gordon attended meetings with the County Executive and spoke directly to him about these matters. (*Id.*) Mr. Gordon also acknowledged meeting with the current County Executive to discuss litigation involving a municipality within Rockland County. (A131).

While an assistant county attorney, Mr. Gordon aided a committee created by the Rockland County Legislature which was charged with the responsibility of forming a county electric agency. (A134-35). To accomplish this task, Mr. Gordon said he interacted with individuals in New York's state capital as well as other municipal electric utility agencies. (A135-36). Finally, Mr. Gordon testified that — at the request of Rockland's County Executive — he worked with counsel for a utility company to determine whether there was a way to reduce electricity rates for residents of Rockland County. He also acknowledged that at these meetings he was representing Rockland County. (A137).

2. *Mr. Thorsen*

Mr. Thorsen, a Democrat, was an assistant county attorney from February 1980 to June 1983. Thereafter, he was appointed deputy county attorney by the then Democrat-controlled County Legislature. (A140). Mr. Thorsen held this position until June 1993, when he decided to become a part-time assistant county attorney. (A141). He remained in this position until March 1994, at which point his employment was terminated.

At trial, Mr. Thorsen testified that he regularly provided general "lawyering" to the Highway Department and legal advice

to the County's Planning and Parks Agencies. (A142-45). Mr. Thorsen described the County's Planning Agency as being "largely concerned with future growth in Rockland County and making certain that we block out areas for parks and how county properties are to be developed in the future." (A145). He also acknowledged that politics and partisan influences played a role in that department's decisions. (A147).

Mr. Thorsen further testified that from time-to-time he acted as "legal counsel" to committees in the county legislature. Acting as such, he gave "legal opinions" when requested. (A148-49). While performing as "legal counsel," Mr. Thorsen drafted memoranda to chairpersons of the various County legislative committees as well as to the Superintendent of Highways. (A151-52). Mr. Thorsen admitted that legislators, who were elected officials, made inquiries of him regarding matters upon which he was working. (A154). Finally, Mr. Thorsen testified that during his last year of employment, he worked on the acquisition of property and helped to prepare contracts for public work. (A142-43). In these efforts, he was directed by the county legislature and the county executive. (A143).

3. *Mr. Flick*

Mr. Flick was first employed by the County in 1989 to help administer the Community Development Block Grant Program. (A165). Mr. Flick testified that the former county executive recommended him for this position. (A174). In January 1992, Mr. Flick was appointed as an assistant county attorney in Rockland County's Office of Community Development. He was the first attorney to staff the Office of Community Development and it was his job to ensure that: (a) federal grant monies were applied properly; and (b) communities seeking federal funds drafted their contracts in accordance with federal requirements.

(A167-69). Before working for the County, Mr. Flick was a Republican. He switched and became a Democrat soon after he started working on the Community Development Block Grant Program. (A123, 165).

The description for Mr. Flick's position includes the following duties and responsibilities:

> Reviews a variety of legal documents, rules and regulations for appropriateness, legality, proper form, applicability, etc.;
>
> Provides advice on a variety of legal matters, recommending proper course of action;
>
> Prepares a variety of legal documents, including contracts and resolutions;
>
> Represents the County of Rockland and meets with municipal officials for discussions, negotiations, clarifications, etc.; and
>
> Performs related work as assigned.

(A238).[1] In letters to the public, Mr. Flick described himself as "general counsel" of the Rockland County Community Development Agency. (A225).

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1. Petitioners are wrong with their challenge to Rockland County's inclusion of a written description of Mr. Flick's duties in the record on appeal. This description was part of the County's summary judgment motion papers (A43) and was, therefore, properly part of the record in the court below. *See* Fed. R. App. P. 10(a); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 638 (9th Cir. 1969).

Mr. Flick testified that he had "sole discretion" to determine whether municipal governments within the County were complying with federal law regarding community development and grant programs. (A172). He described these decisions as "unilateral" because he was the one who advised the municipal attorneys on what language they needed to include in their contracts to qualify for the grants. (A173). Mr. Schoenberger confirmed Mr. Flick's testimony on this point and added that Mr. Flick had "primary" contacts with elected officials to discuss the allocation of funds to various community development projects. (A160).

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

There is no reason for this Court to grant petitioners' application for a writ of certiorari because: (i) the question of whether assistant county attorneys are entitled to First Amendment protection from patronage dismissals is not an open issue and does not raise important legal questions for this Court's review; (ii) the decision below was a plainly correct application of settled law to uncontroverted facts; and (iii) there is no conflict between the decision below and any decision of this Court or any other circuit involving analogous positions.

I.

THE SECOND CIRCUIT'S DECISION DOES NOT RAISE AN IMPORTANT ISSUE THAT CALLS FOR THIS COURT'S REVIEW.

The precedents upon which the decision below turns are well-settled. In *Elrod v. Burns*, 427 U.S. 347, 373 (1976), this Court carved an exception to the general rule that patronage

dismissals violate the First Amendment and exempted employees in policymaking positions and those privy to confidential matters from First Amendment protection. *Id.* at 367. In *Branti v. Finkel*, 445 U.S. 507 (1980), this Court refined the standard in *Elrod*:

> [T]he ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.

Id. at 518. (hereinafter the "*Branti* standard").

Though circuit courts have sometimes wrestled with the application of the *Branti* standard, the courts recognize "[t]his difficulty 'is the natural result of the myriad of governmental bodies, departments, and positions, and the varying responsibilities of public employees.' " *Waskovich v. Morgano*, 2 F.3d 1292, 1297 (3d Cir. 1993), *quoting Pounds v. Griepenstroh*, 970 F.2d 338, 341 (7th Cir. 1992), *cert. denied*, 507 U.S. 910 (1993). With respect to attorney positions, however, the circuit courts are uniform in holding that government attorneys are not protected against politically motivated discharges. *See Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990); *Clark v. Brown*, 861 F.2d 66 (4th Cir. 1988); *Bauer v. Bosley*, 802 F.2d 1058 (8th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987); *Livas v. Petka*, 711 F.2d 798 (7th Cir. 1983); *Mummau v. Ranck*, 687 F.2d 9 (3d Cir. 1982); *Ness v. Marshall*, 660 F.2d 517, 522 (3d Cir. 1981).

This Court should not and need not review each of the decisions that comprise the progeny of *Elrod* and *Branti* as petitioners suggest because when it comes to government attorneys — like petitioners — who: (a) do not have civil service protection; (b) interact with elected officials; and (c) represent

governmental agencies in important matters, the circuit courts have had no difficulty applying the *Branti* standard to reach the conclusion that these high-level attorneys are not entitled to First Amendment protection. Thus, there is no open or important issue to review as evidenced by this Court's denial of certiorari in another high-ranking government attorney case. *See Bauer v. Bosley*, 802 F.2d 1058.

A. The Decision Below Is Not "Sweeping" And Does Not Create An Inappropriate *Per Se* Rule.

Petitioners completely mischaracterize the ruling below by calling it "broad," "sweeping" and one that "effectively creates a *per se* rule" whereby all municipal attorneys are foreclosed from First Amendment protection. Brief at 10.

The Second Circuit did not create a *per se* rule in its decision. To the contrary, the Second Circuit, applying the *Branti* standard, looked to the nature of the petitioners' jobs as well as the duties they performed and found that these positions were ones where party affiliation was an appropriate requirement for job performance. *Gordon*, 110 F.3d at 892. In reaching this conclusion, the court below noted, among other factors, that petitioners were: (i) privy to confidential information held by elected officials; (ii) charged with implementing policy of those officials; (iii) negotiated contracts and litigated on the County's behalf; (iv) represented the County in legislative committees; and (v) represented the County at hearings or in court. *Id.* at 888. Such duties can hardly be characterized as "ministerial functions" and other courts similarly have looked to these factors to decide that a position was not entitled to *Branti* protection. *See, e.g., Williams*, 909 F.2d at 154 (city attorney not protected under *Branti* because position entailed defending city against suits concerning policy disputes and negotiating for city in contract disputes); *Jiminez Fuentes v. Torres Gaztambide*, 807

F.2d 236 (1st Cir. 1986) (Regional Director of Urban Housing and Development Corporation not protected under *Branti* because such "confidential" employees participate in policy formation), *cert. denied*, 481 U.S. 1014 (1987); *Bauer*, 802 F.2d at 1062 (staff legal assistant to circuit court clerk not protected under *Branti* because position entailed representing circuit clerk in contract negotiations and judicial/administrative proceedings); *Ness*, 660 F.2d at 521-22 (city solicitor and assistant city solicitor not protected under *Branti* because positions entailed providing legal advice to mayor to implement policy).

The Second Circuit correctly found that petitioners held positions of a much higher level than they describe in their brief to this Court. Thus, the court below's factual finding that petitioners were not entitled to First Amendment protection from dismissal does not preclude other government attorneys from receiving constitutional relief if they are discharged. If the appropriate facts are established, such attorneys, according to the Second Circuit, are still entitled to protection. *See, e.g., Tavano v. County of Niagara*, 621 F. Supp. 345, 350 (W.D.N.Y. 1985) (First Amendment protected Family Court attorney because position entailed limited discretion and little contact with policymaker), *aff'd*, 800 F.2d 1128 (2d Cir. 1986).

The result below turned on the application of settled legal standards to facts which petitioners could not legitimately dispute. Disingenuously mischaracterizing this fact bound conclusion as a "*per se*" ruling does not entitle petitioners to review in this Court.

II.

THE SECOND CIRCUIT'S OPINION IS IN HARMONY WITH OTHER CIRCUITS REGARDING THE PROPER INTERPRETATION OF THE *BRANTI* STANDARD.

In a facile effort to invoke this Court's jurisdiction, petitioners attempt to create a conflict where none exists. Petitioners cite the decision below and four other cases as examples of rulings that allegedly have ignored the teachings of *Elrod* and *Branti* and allowed patronage dismissals for reasons other than party affiliation. Brief at 15-16. Petitioners' characterization of these cases is simply untrue. In all the cases cited by petitioners, the circuit courts are consistent in their reasoning. Each court correctly recognizes that the *Branti* standard is the ultimate inquiry. *See Akers v. Caperton*, 998 F.2d 220, 224 (4th Cir. 1993) (citing the *Branti* standard as the "established" outlines of the law); *Jiminez*, 807 F.2d at 239 (citing the *Branti* standard as the "dispositive issue"); *Tomczak v. City of Chicago*, 765 F.2d 633, 639 (7th Cir.) (citing the *Branti* standard as "the framework for the analysis"), *cert. denied*, 474 U.S. 946 (1985); *Barnes v. Bosley*, 745 F.2d at 501, 505 (8th Cir. 1984) (citing the *Branti* standard as "the criteria to be used"). And applying *Branti*, each court looks to whether party affiliation is an appropriate requirement of the job at issue by analyzing the duties inherent in the position as well as the actual duties performed by the plaintiffs in each case. *See Akers v. Caperton*, 998 F.2d at 224-25 (in determining whether party affiliation was an appropriate requirement for the effective performance of county highway maintenance superintendent position, looked to the duties the job entailed); *Jiminez*, 807 F.2d at 236 (in determining whether party affiliation was an appropriate requirement for the effective performance of a regional director, looked to whether the position related to partisan political interests); *Tomczak*, 765 F.2d at 642 (in

determining whether party affiliation was an appropriate requirement for the effective performance of first deputy commissioner position, looked to duties entailed by job); *Barnes*, 745 F.2d at 506 (same analysis for deputy circuit clerk). Thus, the cases upon which petitioners rely demonstrate the uniformity of the circuit court's application of the *Branti* standard which, in turn, means that there is no basis for review of the decision below.

Petitioners also spend much time emphasizing language from an Eleventh Circuit case involving employees of a county property appraiser's office as evidence of a conflict between the circuits. *Parrish v. Nikolits*, 86 F.3d 1088, 1093 (11th Cir. 1996), *cert. denied*, __ U.S. __, 117 S. Ct. 1818 (1997). There is no conflict between *Parrish* and *Gordon* because both cases are consistent with this Court's teaching in *Branti*. *Gordon*, 110 F.3d at 886 ("applying principles set forth in . . . *Branti*"); *Parrish*, 86 F.3d at 1093 (recognizing the Branti standard as the "ultimate inquiry"). Although the court in *Parrish* stated that its decision "[parted] ways with those circuits that allow patronage dismissals in policymaking positions that do not directly implicate partisan political concerns," 86 F.3d at 1093, the two cases cited by the Eleventh Circuit fail to illustrate that point. *See Jiminez*, 807 F.2d at 245 (finding that Regional Directors of Urban Housing and Development perform duties that make their roles in government "sufficiently important"); *Tomczak*, 765 F.2d at 641 (finding that position of Deputy Commissioner of Water Department implicates partisan political concerns because politics plays a role in provision of services). Moreover, while they cite *Parrish* four times, petitioners fail to mention that this Court denied certiorari in *Parrish* almost two months ago. Rockland County respectfully submits that this Court correctly disposed of the petition in *Parrish* and should dispose of the petition at issue here in the same manner.

When faced with a *Branti* issue, "a court's function . . . is to do what courts are often called upon to do — to weigh all relevant factors and make a common sense judgment in light of the fundamental purpose to be served." *Jiminez*, 807 F.2d at 242. Petitioners fail to mention this crucial element of the *Branti* analysis. All of the cases cited by petitioners necessarily turn on the specific facts involved. Therefore, not a single case cited by petitioners can be in conflict with the decision below because not one of them involved government attorneys who performed similar duties. Instead, all the cases cited by petitioners involved carefully delineated and narrow interpretations of the *Elrod/Branti* doctrine to positions that bear no relationship to the assistant county attorney positions at issue here. Petitioners fail to address this important point because if they did, they would have to acknowledge that it is unnecessary for this Court to review their case.

A. The Second Circuit Correctly Analyzed Petitioners' Duties In Applying The *Branti* Standard.

Petitioners argue that review should be granted here because the Second Circuit's opinion only examined the inherent or "paper" duties of their positions and that this analysis violated this Court's ruling in *Branti*. Brief at 19. As with all their other arguments, however, this claim is based on a mischaracterization of the Second Circuit's analysis and a misreading of *Branti*.

The opinion below plainly says that *more* than petitioners' written job description were considered. Indeed, the Second Circuit expressly noted that "[e]ach of the [petitioners], of course, worked on tasks narrower than the broad charge contained in the written description." *Gordon*, 110 F.3d at 888. Moreover, the decision below specifically examined each of the petitioners' actual duties. In this regard, the court below observed that Mr. Gordon's actual duties included negotiating property

purchases and other contracts, assisting the Sewer Commission in implementing the County Legislature's wishes, advising the Commission on the legality of its actions, handling the origination of the County's electric utility agency, acting as a liaison between the Legislature and the utility companies, and litigating on behalf of the County. *Id.* at 888. In short, petitioners' argument that the Second Circuit looked only to the written descriptions of their positions is false.

Not only are petitioners wrong with respect to the factual underpinnings of the decision below, but their legal arguments about what this Court said in *Branti* is erroneous. In *Branti*, this Court, "having [ ] framed the issue" around the duties entailed in the particular position at issue, proceeded to analyze the "responsibilities" of the attorney position. *Branti*, 445 U.S. at 1295. Courts have interpreted this rule, as the court below did, to mean that both the powers inherent in the position and the duties actually performed should be considered. *See Peters v. Delaware River Port Auth. of Penn. and N.J.*, 16 F.3d 1346, 1353 (3d Cir.) (noting that analysis implicates "function[s] of the public office" as well as "actual duties performed"), *cert. denied*, 513 U.S. 811 (1994); *Waskovich*, 2 F.3d at 1297 (examined functions performed as well as inherent functions). Courts below have noted that "the actual past duties of the discharged employee are irrelevant if the position inherently encompasses more expansive powers and more important functions that would tend to make political affiliation an appropriate requirement for effective performance." *Peters*, 16 F.3d at 1353, *quoting O'Connor v. Steeves*, 994 F.2d 905, 911 (1st Cir.), *cert. denied*, 510 U.S. 1024 (1993). Therefore, in certain cases, courts need look no further than the inherent duties of the position at issue to apply the *Branti* standard. *See, e.g., Peters*, 16 F.3d at 1353. Whether the facts of a particular case require a court to look further than the duties inherent in a position is not the type of conflict this Court accepts for review.

Similarly, petitioners' attack on other Second Circuit decisions as being inconsistent with *Branti* is meritless. *Savage v. Gorski*, 850 F.2d 64 (2d Cir. 1988) and *Vezzetti v. Pelligrini*, 22 F.3d 483 (2d Cir. 1994), are consistent with *Branti* and have been relied upon by other circuits analyzing First Amendment claims. *See, e.g., Waskovich*, 2 F.3d at 1303 (citing Savage). In fact, three of the cases petitioners cite to support their arguments rely on *Savage* or *Vezzetti*. *Mumford v. Basinski*, 105 F.3d 264, 272 (6th Cir. 1997) (relying upon two factors also articulated in *Vezzetti*; *Peters*, 16 F.3d at 1353 (relying upon two factors articulated in *Vezzetti*); *Waskovich*, 2 F.3d at 1303 (relying upon a factor articulated in *Savage*).

Petitioners' contention that the Second Circuit in *Savage* "explicitly departed from this Court's instruction that party affiliation . . . should govern the propriety of politically-motivated personnel decisions," Brief at 13, is based on a false reading of *Branti*. This Court has never held that party affiliation should "govern the issue." On the contrary, this Court has instructed that the *nature* of the position should govern the issue. *See, e.g., Peters*, 16 F.3d at 1354 (noting that this Court "has directed that we focus on the nature of the responsibilities of the particular position in question"). Hence, patronage dismissals are permitted when the position is one in which party affiliation is an appropriate requirement for job performance as cases petitioners cite aptly establish. *See Mumford*, 105 F.3d at 27; *Peters*, 16 F.3d at 1353; *Waskovich*, 2 F.3d at 1297; *McConnell v. Adams*, 829 F.2d 1319, 1323 (4th Cir. 1987), *cert. denied*, 486 U.S. 1006 (1988).

Petitioners' attacks on the Second Circuit's holding in *Vezzetti* also are based on distortions of the holding in that case as well as the holding in *Branti*. The Second Circuit in *Vezzetti* considered whether a highway superintendent was protected from patronage dismissal. *Vezzetti*, 22 F.3d at 485. In making

this determination, eight factors were noted as being useful in deciding whether a position is one where party affiliation an appropriate requirement. *Id.* at 486. Petitioners' claim that the Second Circuit significantly narrowed *Branti* by listing these factors and "created an exception that has now effectively swallowed the rule against patronage dismissals." This claim is absurd for two reasons. *One*, petitioners fail to acknowledge that the Second Circuit stated in *Vezzetti* and again in *Gordon* that this list of factors is "not an exhaustive list of indicators, nor is any one factor or group of them always dispositive." *Gordon*, 110 F.3d at 890, *quoting Vezzetti*, 22 F.3d at 486. By suggesting factors to be considered when analyzing a *Branti* question, the Second Circuit is assisting lower courts, not narrowing *Branti* in any way. *See Jiminez*, 807 F.2d at 241 ("as courts have addressed the [Branti issue], they have shed light on useful approaches"). *Two*, the "factors" analysis employed by the court below in *Vezzetti* and *Gordon* has been relied upon in cases cited with approval by petitioners. *See, e.g., Mumford*, 105 F.3d at 272; *Peters*, 16 F.3d at 1353.

B. There Is No Conflict Between The Second Circuit And The Other Circuits As To Whether The *Branti* Issue Is One Of Law Or Fact.

Petitioners maintain that this Court should grant the petition to settle an inter-circuit conflict as to whether the *Branti* question is one of law or one of fact. An analysis of the cases reveals, however, this argument, like the others advanced by petitioners, is meritless.

The district court in *Gordon* submitted two issues to the jury: (1) whether petitioners were terminated for political reasons; and (2) whether those terminations were constitutional violations. The Second Circuit held that this second issue, the constitutional question, based on certain undisputed facts was a

question of law. Therefore, it properly found that the district court erred in submitting the question to the jury. *Gordon*, 110 F.3d at 887.

In *Branti*, this Court instructed that the ultimate issue in a political termination case is whether, taking into account the specific facts of the particular situation, party affiliation is an appropriate requirement for the effective performance of the position involved. *Branti*, 445 U.S. at 518. The circuit courts, including the court below, consistently have viewed this question as "one in which a mixture of historical facts to be determined by the trier of fact and a test of constitutional law is involved." *Horton v. Taylor*, 767 F.2d 471, 478 (8th Cir. 1985); *see also Mumford*, 105 F.3d at 270 (finding as matter of law that position was "not protected by the First Amendment"). In other words, in certain cases both questions of fact and law will exist — the nature of the job at issue may involve issues of fact — but the ultimate constitutional question is one of law. Petitioners fail to see this important distinction in the cases.

The Second Circuit's decision in *Gordon* falls in line with the other appellate courts that have addressed this issue and held that patronage dismissal of similar government attorneys, other than assistant public defenders, did not violate the First Amendment. *See, e.g., Bauer*, 802 F.2d at 1062 (staff legal assistant in Office of Clerk of Circuit Court); *Brown v. Trench*, 787 F.2d 167, 169-70 (3d Cir. 1986), *aff'd*, 829 F.2d 30 (1987) (city solicitor and assistant district attorney); *Livas*, 711 F.2d at 800-01 (public prosecutor); *Ness v. Marshall*, 660 F.2d at 522 (city solicitor and assistant solicitor); *Mummau v. Ranck*, 531 F. Supp. 402, 404-05 (E.D. Pa.) (assistant district attorney), *aff'd per curiam*, 687 F.2d 9, 10 (3d Cir. 1982); *Bavoso v. Harding*, 507 F. Supp. 313, 316 (S.D.N.Y. 1980) (corporation counsel); *Montaquila v. St. Cyr*, 433 A.2d 206, 210 (R.I. 1981) (solicitor and assistant solicitor).

Petitioners do not argue that the Second Circuit erred in its factual determinations about their positions as assistant county attorneys. Rather, they claim that the constitutional question regarding their termination must always be a question of fact. Merely restating petitioners' argument demonstrates its fatal flaw. When dealing with high-level government attorneys, the nature of the position can present questions of law appropriate for the court's determination. For example, in *Bauer v. Bosley*, the Eighth Circuit found that the nature of the position at issue was clear from the record and that, therefore, it was unnecessary and error for the district court to submit the question to the jury. *Bauer*, 802 F.2d at 1062. Conversely, in *Soderbeck v. Burnett County*, the Seventh Circuit found that the question regarding the nature of a position within a sheriff's office was sufficiently uncertain as to render it a question of fact for the jury. *Soderbeck v. Burnett County*, 752 F.2d 285, 288 (7th Cir.), *cert. denied*, 471 U.S. 1117 (1985). In *Delong v. United States*, 621 F.2d 618, 623 (4th Cir. 1980), the Fourth Circuit employed the same analysis and found that the issue "may be resolved as one of law or fact depending upon the evidence adduced" *and* remanded the case for reconsideration in light of this Court's ruling in *Branti*.

C. The Second Circuit's Decision Does Not Conflict With The Ninth Circuit's Decision In *Finkelstein v. Bergna*.

Petitioners urge this Court to grant the petition to settle an alleged conflict between the Second and Ninth Circuits as to the proper determination of whether an assistant county attorney/ prosecutor is exempt from First Amendment protection from dismissal. Petitioners' reading of the Ninth Circuit's opinion in *Finkelstein v. Bergna*, 924 F.2d 1449 (9th Cir.), *cert. denied*, 502 U.S. 818 (1991), misses the mark.

In *Finkelstein*, the Ninth Circuit considered whether a

deputy district attorney was entitled to First Amendment from suspension solely because he exercised his right to free speech. In deciding whether the defendant district attorney was entitled to qualified immunity for his action against the plaintiff, the Ninth Circuit found it was not clear that prosecutors were protected from such disciplinary action. *Id.* at 1453. The Ninth Circuit cited both *Elrod* and *Branti* in reaching this conclusion, but relied on *Connick v. Myers*, 461 U.S. 138 (1983) to reach its result. *Id.* Indeed, the language in *Finkelstein* upon which petitioners place much reliance is dicta from the Ninth Circuit about the absence of a reference to *Branti* when this Court addressed the First Amendment issue presented in *Connick*.

Petitioners' reliance on *Finkelstein* and *Connick* is clearly erroneous. Petitioners have never alleged that they were terminated for exercising their right to free speech. Thus, the questions addressed by this Court in *Connick* and the Ninth Circuit in *Finkelstein* are wholly irrelevant to the issues addressed by the court below in this matter. *Branti* simply has no bearing on the First Amendment right to speech and public employees. The case at issue here involves the dismissal of confidential, policymaking employees whose party affiliation relates to job performance. This case is not about dismissal as a result of speech. Accordingly, there is no conflict between *Finkelstein*, a case that involves an assistant district attorney dismissed because of his speech and *Gordon*, a case that concerns assistant county attorneys dismissed because of their political affiliations.

CONCLUSION

It is clear from the facts and law discussed above that the decision of the Second Circuit was correct and not in conflict with any decision of this Court or with any other circuit. No intercession by this Court is necessary. Therefore, the petition for certiorari should be denied.

Respectfully submitted,

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